

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

COLDEN HILLS, INC.

Case No. 3-CA-22657

and

INTERNATIONAL ASSOCIATION OF HEAT
AND FROST INSULATORS AND ASBESTOS
WORKERS, LOCAL 30

Linda M. Kowalski and Ronald Scott, Esqs.,
for the General Counsel.
Michael R. Moravec, Esq. (Phillips, Lytle,
Hitchcock, Blaine and Huber, LLP),
of Buffalo, New York, for the Respondent.

DECISION

Statement of the Case

ARTHUR J. AMCHAN, Administrative Law Judge. This case was tried in Buffalo, New York on January 27, 2003. On May 28, 2002, the Board affirmed the decision of Administrative Law Judge Eric Fine and found that beginning on February 17, 2000, Respondent, Colden Hills, Inc., an insulation contractor with offices in Buffalo, violated Section 8(a)(3) and (1) of the Act in refusing to hire and refusing to consider for hire Brian Urquhart, *Colden Hills, Inc.*, 337 NLRB No. 86. Urquhart is a business agent and organizer of Local 30, International Association of Heat and Frost Insulators and Asbestos Workers (the Union). Local 30's offices are in Rochester and Urquhart lives in Webster, New York, east of Rochester.

Due to disagreement over the amount of back pay owed to Urquhart, the Regional Director issued a compliance specification and notice of hearing on October 22, 2002. In the specification, the Regional Director alleged that the back pay period ran from March 21, 2000 to August 19, 2001. At the hearing, the General Counsel amended the specification to allege a back pay period from March 21, 2000 to May 31, 2001, a little more than 14 months. Pursuant to that amendment, the General Counsel alleges that Respondent is obligated to pay Urquhart \$11,230 in order to make him whole for the discrimination against him.

Respondent does not take issue with the gross back pay calculated by the Regional Director (\$12,679). However, it argues that either no back pay should be due or the amount due Urquhart should be reduced for several reasons. First and foremost, Respondent argues that Urquhart did not take reasonable steps to mitigate his damages. Secondly, Respondent argues that while the compliance specification reduced Urquhart's back pay by \$1,494 on account of interim earnings, his W-2 form shows that he earned \$1,914. Respondent also alleges that the General Counsel seeks to require it to pay Urquhart's mileage expenses twice. Upon checking the arithmetic in the final specification, I conclude that Respondent is simply incorrect on this point. The \$11,230 requested considers the mileage expense only once.

However, I find Respondent is correct that Urquhart's interim earnings for the second quarter of 2000 were those shown on his W-2.

Brian Urquhart's efforts to mitigate damages

Brian Urquhart was a full-time organizer and business representative of the Union throughout the back pay period. He concedes that he made no effort to gain interim employment during the back pay period with union contractors. Most of the members of his local were employed during this period.

Urquhart also concedes that he made no effort to seek employment in the Buffalo metropolitan area (in which Respondent is located) during the back pay period other than one telephone call to Respondent on July 28, 2000. There are non-union insulation contractors in the Buffalo area other than Respondent. The one interim job Urquhart had in the back pay period was with New York Insulation Company, which is located in Kirksville, New York, east of Syracuse. After being laid off by New York Insulation on April 16, 2000, Urquhart made no effort during the back pay period to find work in the Syracuse area.

Urquhart made contact with the contractors and employment agencies listed below to find interim employment during the back pay period. Some of these contacts were in person and some were over the telephone.

Second Quarter 2000

April 3-16: Interim Employment with New York Insulation Company, Kirksville, New York (east of Syracuse).

May 9: Tambe Electric Company, located in Ontario County, east of Rochester.

June 6: Tambe Electric

June 7: D & B Insulation, Rochester, New York.

June 13: Flower City Insulation, Rochester area.

June 13: Addeco employment service, Rochester.

June 15: Flower City Insulation—interview.

Third Quarter 2000¹

July 28: Respondent Colden Hills-telephone call.

August: None

September 5: Tambe Electric

¹ Exhibit G.C. -2 indicates that Urquhart registered with the New York State Unemployment Service. However, I cannot discern whether this was in July 2000, July 2001 or both.

Fourth Quarter 2000

October 5: Tambe Electric

5 November 6: Tambe Electric
Summit Insulation, Rochester, New York.

November 10: Summit Insulation

10 November 13: Summit Insulation

November 16: Summit Insulation

15 November 17: Summit Insulation

November 22: Summit Insulation

November 28: Summit Insulation

20 December 6: Tambe Electric

First Quarter 2001

25 January 4: Tambe Electric

January 29: Payforce Temporary Employment Agency, Rochester area.

January 29: Summit Insulation

30 February 5: Payforce Employment Agency

February 9: D & B Insulation—filled out application

35 March 8: Expert Personnel Employment Agency, Rochester area.

March 8: Sumas Corporation (a temporary employment agency), Rochester area.

March 27: Addeco Employment Agency

40 Second Quarter 2001

April 2: Premier Staffing (temporary employment agency), Rochester area.

45 May 2: Summit Insulation

May 4: Summit Insulation

May 8: Gypsum Systems, Ontario County, east of Rochester.

50 May 9: Summit Insulation

May 31: Expert Personnel Employment Agency (last day of back pay period), Rochester area.

Analysis

In *Ferguson Electric Co.*, 330 NLRB 514 (2000) enf'd 242 F.3d 426 (2nd Cir. 2001), the Board addressed a full-time union organizer's entitlement to back pay. First, the Board decided that the wages paid an organizer by his union are earnings from secondary employment, akin to moonlighting, and are not properly offset against gross backpay. Secondly, the Board applied its general rule regarding mitigation of damages, which is clearly set forth in *Black Magic Resources*, 317 NLRB 721 (1995).

...[a]n employer may mitigate its backpay liability by showing that a discriminatee neglected to make reasonable efforts to find interim work... This is an affirmative defense, however, and the burden is on the employer to show the necessary facts. The employer does not meet this burden by presenting evidence of lack of employee success in obtaining interim employment or of low interim earnings... Further, the standard to which an employee's efforts are held is one of reasonable diligence, and he or she need not exhaust all possible job leads... Finally, in determining whether an individual claimant made a reasonable search, the Board looks to whether the record as a whole establishes that the employee has diligently sought other employment during the entire backpay period... Any uncertainty in the evidence is resolved against the Respondents as the wrongdoers...(citations omitted).

Since an employee's diligence is judged by his efforts during the entire back pay period, an employer cannot mitigate damages by establishing, for example, that the discriminatee did not instantly seek new work if he or she engaged in a diligent search during the back pay period as a whole, *Saginaw Aggregates, Inc.*, 198 NLRB 598 (1972). In *Ferguson Electric*, the Board also held that an employer cannot show that a union organizer failed to mitigate damages simply by establishing that his union limited his interim employment opportunities to non-union contractors. A discriminatee need only follow *his or her regular method for obtaining work* (emphasis added). However, since Urquhart applied for work with Respondent in Buffalo and worked for New York Insulation during the back pay period in the Syracuse area, I conclude that seeking work in Buffalo and Syracuse was part of Urquhart's regular method for obtaining work. Urquhart did not exercise reasonable diligence in failing to seek interim employment in the Buffalo and Syracuse areas during the first and second quarters of 2001, and seeking work in these areas only once in third quarter of 2000 and once in the fourth quarter of 2000.

Moreover, aside from Urquhart's failure to seek work near Buffalo and Syracuse, I conclude that this record establishes that he did not make a diligent search for interim employment in the third and fourth quarters of 2000. In the third quarter, he made only two contacts towards finding a job; one, a telephone call to Respondent and the other a call or visit to Tambe Electric. In the fourth quarter, he contacted only two companies; Tambe, once each month, and Summit Insulation, which he contacted seven times in three weeks. During these six months, Urquhart did not register or contact any employment service and did not contact several other employers that he contacted during the back pay period.

In the first quarter of 2001, Urquhart contacted only three employers, two of which were Tambe and Summit. He also registered with several temporary employment agencies. During the second quarter of 2001 Urquhart contacted only two employers, Summit Insulation (three times) and Gypsum Systems, plus two employment agencies, all of which were located in the Rochester vicinity. Given the small number of potential employers he contacted near

Rochester, reasonable diligence would require efforts to obtain employment in the Buffalo area, where he had previously sought employment from Respondent, and the Syracuse metropolitan area, where he had previously worked during the back pay period.

5 I find that that Brian Urquhart failed to exercise reasonable diligence in seeking interim employment in the third and fourth quarters of 2000 and in the first two quarters of 2001. I therefore conclude that he is not entitled to back pay for these quarters.

Conclusion

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I find that Brian Urquhart is entitled to \$ 475 in back pay, computed as follows:

First Quarter 2000: \$298

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Second Quarter 2000: \$177 [\$2039 gross pay - \$1,862 net interim earnings] (\$1,914 gross interim earnings-\$52 mileage expense (\$0.365 x 142 miles)=\$1,862 net interim earnings)

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended²

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ORDER

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The Respondent, Colden Hills, Inc., Buffalo, New York, its officers, agents, successors, and assigns, shall make whole Brian Urquhart by paying him back pay in the amount of \$475 plus interest.

Dated, Washington, D.C. March 26, 2003.

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Arthur J. Amchan
Administrative Law Judge

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² If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.